IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

TRUST PETITION NO.3 OF 2004
WITH
NOTICE OF MOTION NO.1638 OF 2004

Savitri Biharilal Nagpal & Ors. ..Petitioners.

V/s.

Kishore Bhagwandas Nagpal & Ors. ..Respondents.

Mr.D.S.Parekh, Sr.Advocate a/w.Mr.Vaishnawa i/b. M/s. N.N.Vaishnawa & Co. for Petitioners.

Mr.Arif Bookwalal, Sr.Advocate a/w. Mr.Cyrus Ardeshir, Ms.Shefali Desai, Ms.Jyoti Tankie i/b. Shah & Sanghavi for respondent Nos. 3 and 4.

Mr. P.N.Modi a/w Ms. Sunita Masani i/b. N.C.Dalal & Co. for Respondent No.2.

CORAM: A.M.KHANWILKAR,J

DATE : JULY 26, 2007.

P.C. :

1. The abovementioned main Petition has been filed under the Provisions of the Indian Trusts Act, 1882. The Petition however, makes no reference as to under which provision of the Act, the same has been filed. In absence of such statement in the Petition, the Respondents have raised preliminary objection regarding the maintainability of the Petition on different counts on the assumption that it is filed under that provision of the Act. The Counsel for the

Petitioners however, at the hearing made it clear that he would press for the reliefs prayed in the Petition only in the context of Section 74 of the Act. The Counsel for the Petitioners also fairly stated that only prayer clauses (a) and (d-a) of the Petition can be pressed for grant of relief in terms of Section 74 of the Act.

2. Accordingly, the consideration in the present Judgment will be confined to the limited controversy raised by the Petitioners in the context of relief in terms of prayer clauses (a) and (d-a) of the Petition, which read thus:

> "(a) For a declaration that Respondent Nos.1 and 2 are unfit to act as Trustees of the J.B.Nagpal and other Trusts and to forthwith order and direct their removal as Trustees of the said Trust.
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> (d-a)) That this Hon'ble Court be pleased to pass an order and decree to appoint some fit and proper person as the Administrator of the said Trusts and to take charge and/or Management of the Trust property to supervise and manage the affairs of the trust by and under the direction and supervision of this Hon'ble Court for such term and conditions as this Hon'ble Court may deem fit and proper."

3. Briefly stated, on or about 14th February, 1959 Bhagwandas Karamchand Nagpal created nine family

Trusts, wherein he described himself as a Settlor; and appointed his two sons Biharilal and Jethanand, his wife Kalavantibai(Respondent No.1), his brother Tulsidas and his nephew Ramchand Gulumal, as Trustees. The object, for which the said Trusts were created was for the benefit of, interalia, his wife and children - which included three sons, namely, Biharilal, Jethanand, Kishandas(Kishor) and his daughters Shantabai, Lajabai, Kamlabai- and his two daughters in law, namely, wives of his sons Biharilal and Jethanand(Petitioner Nos. 1 and 2 herein.) As on 14th February, 1959, the said Kishandas(Kishor) Bhagwandas Nagpal was a minor.

4. For the nature of controversy to be decided in the present Judgment in the context of reliefs (a) and (da), it is not necessary to elaborate all the aspects referred to in the Trust Petition, except to note that a change was brought about in the composition of the trustees. It is also relevant to point out that the Respondent No.1 who was one of trustee, died during the pendency of the present proceeding. The grievance of the Petitioners essentially, is that, the Respondent No.2 has taken complete control of the Trust property and is taking

unilateral decisions disregarding the other trustees. Moreover, recently, the said Respondent No.2 alongwith the Respondent No.1 went to the extent of removing the first Petitioner as trustee by recording resolution on 28th April, 2004 and thereafter, passed further resolution on 20th May, 2004 appointing Respondent Nos.3 and 4 as new Trustees. In the context of those developments serious grievance has been made in the Trust Petition. However, as mentioned earlier, the controversy before this Court has been limited by the Petitioners in the context of reliefs in terms of prayer clauses (a) and (d-a), in relation to the case made out in the amended paragraphs 5(D) and 5(G) to 5(K) of the Petition. The substance of the controversy in these paragraphs is that the Respondent No.2 although has collected the amount towards taxes from the tenants in the Trust property, to be paid to the Corporation, has not fully paid the Corporation dues. This was a clear case of imprudence and negligence by the Respondent No.2 resulting in exposing the trust property to the peril of attachment and sale, thereby rendering himself unfit to act as a trustee of the trust. This is the substratum of the case made out on behalf of the Petitioners by the counsel at the

time of argument. No argument has been canvassed before me that the amount unpaid by the respondent No.2 has either been misappropriated or misused by him for his own benefit. Moreover, as the amount is required to be paid to the Corporation, there is no question of any loss being caused to the beneficiaries, as such. I shall straightaway reproduce the averments in paragraphs 5(D) and 5(G) to 5(K) of the Petition, which reads thus:

> "5D. The Petitioners state that in August 2005, a sum of about Rs.30.00 Lacs was outstanding towards Municipal taxes being property taxes and repair cess in respect of the said building. The Petitioner No.4 had filed Affidavit to that effect. The Respondent No.2 denied the same and alleged that he has paid about Rs.18.00 Lacs towards B.M.C. dues but no receipt was produced by him of Rs.18.00 Lacs allegedly paid by him to the Corporation. Hereto annexed and marked Exhibit 'BB' is a copy of letter dated 16th August 2005, issued by the Municipal Corporation of Greater Bombay showing total outstanding of Rs.29,99,669/-.
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> 5G. The Petitioners state that, inspite of having received the said amounts, amounts due and payable to corporation as of today is to the tune of about Rs.28,56,000/-. Hereto annexed and marked Exhibit 'CC' is a copy of the said letter dated 15/2/2007 showing a sum of Rs.28,56,711/-. It is surprising that where the moneys are spent by Respondent No.2 unilaterally without the knowledge and consent of the Petitioners.
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> 5H. The Petitioners state that major amount of repair and Municipal Taxes is due

to occupation by Oriental Bank of Commerce occupying ground floor portion. The said bank is paying repair cess and Municipal Taxes directly to the Respondent No.2 for payment to the Municipal Corporation and as is informed by the said Bank to the Petitioners, the Bank has paid all dues for the period upto March, 2007. Hereto annexed and marked Exhibit 'DD' is the copy of the letter dated 9/2/2007 issued by the Oriental Bank of Commerce, the ground floor tenants of the suit building. Inspite thereof, the Respondent No.2 has not cleared the dues of the corporation and which are as on today Rs.28.50 Lacs. The Petitioners state that in the last about five years the Respondent No.2 has retained with himself Rs.20.00 Lacs from the deposits received from Global Trust Bank now merged with Oriental Bank of Commerce, Rs.7.5 Lacs towards repair and Rs.6.00 Lacs towards repairs. No repairs are carried out except to lift as stated hereinabove. The Respondent No.2 has been recovering rent from all the tenants including from the bank. The Bank pays about Rs.90,000/- towards rent in addition to which the bank also pays repair cess and Municipal taxes. The Petitioners state that the Oriental Bank of Commerce by their letter dated 11/2/2005 stated that they paid Rs.8,32,949/- tod the Respondent No.2 towards arrears and current B.M.C. Bills submitted to them by the Respondent No.2. The Petitioners state that it is shocking that inspite of recovering the money and inspite of regularly receiving the rent from all the tenants and repair cess and B.M.C. Taxes from Bank still a sum of over Rs.28.00 Lacs approx. is due and payable to the Corporation towards repairs cess and Municipal Taxes. Hereto annexed and marked Exhibit 'EE' is the copy of the said letter dated 11/2/2005.

5I. The Petitioners state that when the aforesaid facts of the due of Rs.30.00 Lacs were pointed out by the Petitioners before this Hon'ble Court around in August 2005 the Respondent No.2 filed an Affidavit dated 12/9/2005 and annexed a statement alleging

> that he paid taxes in excess. Hereto annexed and marked Exhibit 'FF' is the statement filed by the Respondent as Exhibit 'A' to his Affidavit dated 12/9/2005. However, the fact remains that as on today still over Rs.28 Lacs remains due and payable to the corporation.
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> 5J. The Petitioners state that acts of the Respondents would certainly lead to auctioning of the said building thereby depriving each of the beneficiaries of the said trust of their valuable rights in the said property. The Petitioners state that the trusts has only one property i.e. the building Bhagwat Niwas.
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> 5K. The Petitioners state that this clearly shows the manner in which the Respondent No.2 is unilaterally functioning and acting contrary to law and contrary to conscience and treating himself as the sole owner of the said property."

5. Relying on the above said assertions, the Petitioners contend that the Respondent Nos. 1 and 2 rendered themselves unfit to act as trustees of the J.B.Nagpal and other Trusts, for which reason it be assumed that vacancy has arisen in terms of Section 73 of the Act, which will have to be forthwith filled in by appointing new trustees in their place in exercise of powers under section 74 of the Act.

6. Before adverting to the stand taken on behalf of the Respondent no.2 on affidavit to counter the case put forth by the Petitioners in relation to the

nonpayment of Corporation dues or of willful default committed by the Respondent No.2, I think it appropriate to straightaway address the preliminary objection raised on behalf of the said Respondent. According to the said Respondent, for the nature of reliefs claimed in the Petition, the same were clearly beyond the scope of enquiry to be made by the Civil Court either under Section 34 or Section 74 of the Act. In support of this preliminary objection, the Counsel for the Respondent No.2 relied on the decision of our High Court in the case of **Naraindas Menghraj Nagpal V/s.Lalchand M. Nagpal reported in 1979 MLJ 485,** which Judgment was in relation to the proceeding under Section 34 of the Act. In that decision, the Court went on to observe that the case involving disputed question of fact and law or any issue raised to resolve private quarrel between the trustees cannot be gone into in an application under section 34 of the Act. Reliance is also placed on another decision of the Division Bench in the case of **Nathabhai Devidas and Ors. V/s. Vaghjibhai Jhaverbhai** reported in **AIR 1928 Bombay 20,** wherein the Court has observed that application for the removal of a trustee should undoubtedly be brought by a suit. Reliance is also placed on the decision of

Saurashtra High Court in the case of **Patel Vrajlal Bhagwandas V/s. Patel Jamnadas Tribhovandas and ors. reported in 1956 Saurashtra 51,** wherein it is observed that where a breach of trust is alleged by any trustee and that is made a ground for his removal, the appropriate remedy is by way of a suit. It is further held that sections 73 and 74 of the Trusts Act are not intended to apply to contentious or disputed cases, where proceeding by way of suit is appropriate.

7. Counsel for the Petitioners however, in all fairness took the stand that the present application be treated as one filed under Section 74 of the Act. The learned Counsel would then contend that the decisions pressed into service on behalf of the Respondent No.2 were of no avail. For, the same have not taken the view that the jurisdiction of the Civil Court is completely barred under section 74, to consider the prayer for declaration that the Respondent No.2 has rendered himself unfit to act as trustee of the Trust. It is argued that on recording a finding on the point that the Respondent No.2 has become unfit, it is open to exercise powers under Section 74 of the Act and to appoint some other fit

and appropriate person to act as trustee of the Trust. Besides, the Learned Counsel would rely on the exposition in **Halsbury Vol. 48** in paragraphs 725 and 775. Paragraph-725 deals with the established position regarding the Power of the court to appoint new trustee. The established position regarding procedure for removal of trustee against his will is articulated in paragraph-775. It is mentioned that where there is no dispute of fact, the court, in exercise of its statutory power to appoint new trustees, may order the removal of a trustee against his will in proceedings begun by originating summons. In the same paragraph, it is further mentioned that where there is dispute of fact, the proper course is to invoke the court's inherent jurisdiction over trustees in an action begun by writ for the administration or execution of the trusts.

8. The Learned counsel for the Petitioners would also rely on the decision of the Allahabad High Court in the case of **Khatoon Jannat Bibi V/s. Syed Wali Ullah and Anr. reported in A.I.R.(36) 1949 Allahabad 310.** Emphasis was placed on the exposition in paragraphs 22 onwards of this reported Judgment, which takes the view that there is nothing in Section

74 to limit its application only to non-contentious cases. The Allahabad High Court went on to observe that in fact when Section 74 gives power to the Court to appoint a new trustee on the ground of unfitness or personal incapacity of an existing trustee, the proceeding in its very nature cannot be non-contentious. Further, even in the case of appointment of a new trustee, in place of a deceased one, the matter may be disputed by rival claimants. The Allahabad High Court was of the view that the provision such as Section 74 has been introduced by the Legislature deliberately for providing a speedy procedure for the appointment of a new trustee, keeping in mind the interest of a Trust and to provide speedy remedy to the beneficiaries to have a new trustee appointed. In the same paragraph, the Allahabad High Court has expressed that assuming that a suit was maintainable for removal of a trustee, that would be an alternative remedy. Counsel for the Petitioners also invited my attention to the latest decision of our High Court in the case of **Manhar Shivji Shethia & Ors. V/s. Lilavati Madhusudan Shethia & Ors. reported in 2001(1) Bom.C.R.817.** This Judgment has dealt with all the aforesaid decisions on the point. On analysing the gamut of decisions, this Court preferred to follow the dictum

of cases, particularly, of our High Court, which followed the principles applicable even under the English law, to conclude that in contentious matters, Section 74 cannot be invoked and the party will have to be relegated to a suit. Counsel for the Petitioners relying on the decision of the Allahabad High Court would contend that the opinion recorded in the decision in the case of **Manhar Shethia(Supra)** referred to above will require reconsideration.

9. Having considered the submissions with regard to the maintainability of the Trust Petition, in the form in which it is presented, and after examining the decisions pressed into service by both the sides, as referred to above, I see no reason to depart from the consistent view taken by our Court that if it is a case of contentious matter, that cannot be resolved in proceedings under Section 74 of the Act. Indeed, whether the case involves a contentious or non-contentious matter will depend on the facts of each case. The natural and ordinary meaning of the expression "Contentious" will have to be applied. The meaning of expression "Contentious" can be culled out from the Black's Law dictionary which reads thus:

> "**Contentious-** Contested; adversary; litigated between adverse or contending

> parties. A judicial proceeding not merely *ex parte* in its character, but comprising attack and defense as between opposing parties, is so called. Character of being quarrel some or belligerent."

10. As mentioned earlier, the question whether the matter involves contentious issues will depend on the facts of each case. Even the exposition occurring in **Halsbury** in paragraph-775 restates the established position that where there is a dispute of fact, the appropriate course is to invoke the court's inherent jurisdiction over trustees in an action begun by writ for the administration or execution of Trusts. In other words, the Petitioners may be right to the extent of contending that it is matter which would involve dispute of fact, those matters cannot be proceeded in exercise of powers under Section 74 of the Act and the parties will have to be relegated to institute suit for appropriate relief as may be advised. In the decision of our High Court in **Manhar Shethia (Supra)**, reference is made to the unreported decision of another single Judge of our High Court in **Trust Petition No.12 of 1983 decided on 5th November, 1984.** I had the advantage of going through the entire text of the said Judgment, Copy whereof was made available by the office which is included in the compilation of Appeal No.1133 of 1984 arising from the Trust Petition No.12 of 1983. The principle

expounded in this unreported decision has been analysed in the Judgment in the case of **Manhar Shethia(Supra)**. It is held that the said unreported decision is not a Judgment on the point as to what is a contentious or non-contentious issue. In fact, even this unreported decision follows the same principle stated in the earlier decisions that the enquiry in the proceeding under Section 74 will have to be limited in its scope to matters that can be readily determined in an enquiry of a summary nature. However, the Court thereafter, went on to analyse the fact of that case to hold that on the basis of the conduct of the first defendant therein, the matter required examination to ascertain whether the first respondent therein had rendered himself unfit to continue as trustee of the trust.

11. Suffice it to observe that, it is not as if remedy of section 74 is totally precluded for seeking relief of removal of the existing trustee on the assertion that he has rendered himself unfit or personally incapable to act in the Trusts. It is for the Court to consider whether the issue brought before it was a contentious or non-contentious matter. If it is found that it is a contentious matter, the Court will be slow in exercising powers

under Section 74 of the Act and instead would relegate the parties to file a suit for appropriate relief as may be advised. However, if it is a case of non-contentious issues, the Court is free to proceed with the enquiry and pass appropriate order as may be warranted in the fact situation of that case. This being the settled legal position consistently followed by our High Court, even if any other view is possible, that will have to be eschewed applying the principle of **stare decisis**.

12. The next question is whether the matter brought by the Petitioners before this Court is a contentious issue. To consider that aspect, it will be necessary to first advert to the stand taken by the Respondent No.2 on affidavit filed before this Court from time to time to counter the allegations made against him by the Petitioners. The Respondent No.2 filed first affidavit before this Court dated 30th June, 2004. However, as the ground which is now pressed into service before this Court was not articulated or spelt out in the original Petition, obviously, the Respondent No.2 has made no reference in that behalf in this reply affidavit. The next reply affidavit filed on behalf of the Respondent no.2 is dated 30th August, 2004. In paragraph-7 of

this affidavit, the Respondent No.2 has asserted as follows:

> "I repeat and reiterate that the allegations of outstanding cess/taxes to the extent of Rs.25- Rs.34 lakhs is totally false, imaginary and concocted. I deny that the trust has any "deficit balance" as falsely alleged. The Petitioners are also beneficiaries who received their share of the distribution without any complaint. However, if the petitioners now feel that they should not have received/taken such distribution, they are free to refund the same to the trusts, even though the trusts do not require the funds at present and the trusts will be able to meet the outgoings and liabilities of the trust properties from the rent recovered from the tenants. I deny that the trusts property is at all liable to be attached or sold or auctioned by the Corporation as falsely alleged or otherwise. I say that the property is well and sufficiently protected."

13. Later on, the Respondent no.2 has filed another affidavit dated 12th September, 2005. In paragraph-6 to 8 of the said affidavit the Respondent No.2 has offered explanation about the circumstances, in which the said amount was consciously not paid to the Corporation on having questioned the validity of the dues claimed by the Corporation. The relevant portion of the said affidavit reads thus:

> "6. With reference to para 5 of the said additional affidavit, I deny that there are huge arrears of dues of taxes and/or repair cess payable to BMC in respect of the said

building. I say that the out of the alleged amount of Rs.29,99,669/-, liability of Rs.4,21,376/- is under dispute. However, the trusts have paid an amount of Rs.18,56,663/- to the B.M.C. which is more than the amount due and payable by the trusts. Hereto Annexed and Marked as Exhibit-A is a calculation of the correct amounts due, and payments made by the trusts. In any event the issue of the disputed tax liability will have to be dealt with in the appropriate forum by the concerned, authorities and cannot be adjudicated in the present Petition and therefore cannot furnish any cause of action to the Petitioners. It is also pertinent to note that in fact it was the 3rd Petitioner who had in the past made fraudulent representations to the B.M.C. to procure orders for reduction of the tax liability of the Bank premises then occupied by the previous licensee Bank and it was for this reason that he was removed from his past as a trustee by a resolution dated 1st October, 1994(Exhibit-E to the Petition), which was never challenged by him. It therefore, does not now lie in the Petitioners month to canvass the cause of the B.M.C.taxes.

7. With further reference to para 5 I deny that repair cess collected from Oriental Bank of Commerce, the Current Bank tenant in the said premises, has not been deposited with the B.M.C. A receipt of Rs.8,73,238/- evidencing payments made to the BMC in respect of repair cess is hereto annexed and marked as Exhibit-B. Consequently, all the Petitioners allegations in respect of B.M.C. property taxes and repair cess are totally false misleading untenable and denied. It is totally false and denied that rent received and expenses incurred have not been accounted for or that any accounts have been manipulated as falsely dishonestly and maliciously alleged or otherwise.

8. With reference to para 6 I deny that anything disentitles me from acting as a trustee or that payments of arrears of BMC taxes amount to Rs.30/- lacs or that I am liable for the same or that I personally have

> received any rents or not accounted for any rents as falsely and mischievously alleged or otherwise. In fact admittedly for the 15 years that Petitioner No.3 was the managing trustee, he never maintained any separate accounts of the trusts or even a separate Bank account of the trusts. Indisputably the Petitioners have misappropriated trust funds and pocketed tenancy transfer premium without accounting to the trusts. Indisputably the Petitioners have usurped trust property and illegally converted the same into a shop for their own aggrandizement and do not even account to the trusts for the income therefrom."

14. As is seen from the above said extracted portion of the affidavit, the Respondent NO.2 relied on the calculations of the correct amounts due and payments made by the trust and also on the receipt of payment made to the Corporation. It is seen from the documents produced by the Respondent No.2 that the payment has been made by the trustees on behalf of the Trust and called upon the Corporation for rectification of the demand. The Respondent No.2 has then filed recent affidavit on 14th March, 2007, which refers to the facts stated by him in the earlier affidavits and recapitulates the stand in respect of the outstanding amounts, to be paid to the Corporation, which can be discerned from the paragraph-11.10(b) which reads thus:

> ". The Petitioners have inter-alia

falsely alleged that large amounts are outstanding due and payable by way of municipal taxes to the BMC. All such allegations are irrelevant to the questions in issue in the present petition, and are a dishonest attempt to prejudice and mislead this Hon'ble Court. It is false and denied that there are any such large out standings to the BMC as falsely alleged. In fact according to the Respondents, the BMC owes a substantial credit to the said trusts. I deny the correctness of the BMC's alleged letters dated 16.8.2005 and 15.2.2007. It is submitted that:

(i) from August 2005 to January 2007, the BMC raised no bills for property taxes or repair cess since the ratable value was being re-calculated by the BMC in view of the increase in rents. The Trusts however continued to pay BMC the taxes at the old rates.

(ii) In February 2007, the Trusts received 4 bills for property taxes for the period 1.4.2005 to 31.3.2007, for a total of Rs.6,86,890/-, and the same has been duly paid to the BMC.

(iii) On 9.3.2007, the Trusts received 3 Repair Cess bills from the BMC for the period 1.4.2005 to 30.9.2006 for a total sum of Rs.6,89,040, and these bills also have been duly paid.

(iv) Certain old repair cess bills have not been paid because the trusts dispute the correctness thereof inter-alia on the ground of incorrect valuation of rateable value for the relevant time. The Petitioners are fully aware of the said dispute, and the fact that the BMC is still considering the trusts representations to the BMC in respect thereof. In fact the BMC has therefore taken no steps what so ever for recovery.

. As regards the allegation that no receipts have been produced of payments made to the BMC, it is submitted that the same is totally false. As aforesaid, the petitioners have taken full inspection of all the trusts

> records even though they refused to reciprocate and give inspection of the trusts records for the time that Petitioner No.3 was the managing trustee. It is therefore obvious that all the said allegations of the Petitioners are totally baseless and untenable.
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> . It is false and absurd for the petitioners to allege that the said building may be auctioned, and such allegations have been made only to willfully mislead this Hon'ble Court."

15. After hearing the parties for quite some time, it was suggested to the Respondent No.2 to place on record further affidavit highlighting the position prefacing the stand of the respondent No.2 confined to the grievance of the Petitioner regarding non-payment of Corporation dues. The Respondent No.2 has filed such affidavit dated 9th July, 2007. Relevant portion of the said affidavit reads thus:

> 2. By an Amendment to the Petition the Petitioners have sought to rely upon Exhibit "BB" to the Petition (Page-183) to allege that Municipal taxes and repair cess are outstanding/ unpaid. The same has been replied to in detail at page No.74, para 6 of my Affidavit in Ex-A reply, read with page-77 to 81 Ex-B thereof. In short, I repeat and Ex-C retreat that in fact an excess Ex-D payment was made to the Municipal Ex-E Corporation as therein stated. Annexed hereto and marked Exhibit-A to E are copies of the relevant statement of Account as well as documents evidencing payments made to the Municipal Corporation as therein referred to. It is pertinent to note that these letters, under cover of

which the said payments were made, also refer to the pending dispute with the BMC in respect of calculation of ratable value.

3. Subsequently, the Petitioners have procured a letter dated 15th February, 2007 from the BMC, a copy whereof is Exhibit-"CC" to the Petition. (Page No.185). The allegations therein as regards outstanding Municipal Tax and repair cess have been dealt with in detail in para 11.10(b) at page No.17 of my Affidavit in reply. As stated therein

i) from August 2005 to January 2007, the BMC raised no bills for property taxes or repair cess since the ratable value was being re-calculated by the BMC in view of the increase in rents. The Trust however continued to pay BMC the taxes at the old rates.

ii) In February 2007 the Trust received 4 bills for property taxes for the period 1st April, 2005 to 31st March, 2007, for a total of Rs.6,86,890/- and the same has been duly paid to the BMC.

iii) On 9th March, 2007 the Trust received 3 repair cess bills from the BMC for the period 1st April, 2005 to 30th September, 2006 for total sum of Rs.6,89,040/- and these bills also have been duly paid.

iv) certain old repair cess bills have not been paid because the trusts dispute the correctness thereof inter-alia on the ground of in-correct valuation of rateable value for the

relevant time. The Petitioners are fully aware of the said dispute, and the fact that the BMC is still considering the trusts representations to the BMC in respect thereof. In fact the BMC has therefore taken no steps what so ever for recovery.

I deny the correctness of the purported statements of alleged outstanding property taxes, repair cess etc., as procured by the Petitioners and/or their Advocates from the B.M.C. from time to time.

Ex-F Annexed hereto and marked Exhibit-F is a sample of one of the letters written a behalf of the said trusts, disputing the correctness of such statements.

Ex-G to Ex-K Annexed hereto and marked, as Exhibit-G to K are copies of the relevant receipts, evidencing the payments as mentioned herein above."

16. In response to the affidavit dated 9th July, 2007, the Petitioners have filed affidavit of Petitioner No.2 sworn on 17th July, 2007, the relevant portion of this affidavit reads thus:

"2. I say that after getting the said reply, I have made detailed enquiries with the concerned office of the Corporation and have learnt that Respondent No.2 has paid all outstanding property taxes.

3. I say that the repairs cess of Rs.21,60,090/- was outstanding. Said outstanding is from the year 1998. I say that towards the said repairs cess the Respondent No.2 has paid Rs.3,39,664/- on 6.9.2005 at page 12 to his affidavit, the said amount was for the period 2004 which is

> not shown as due and payable by the Petitioners in Ex."CC" to the petition. However, towards the total dues of Repair cess of about Rs.21 lacs, the Respondent No.2 has paid Rs.6,89,040/- on 13.4.2007 at page 15 of his affidavit. However, as on today Rs.15,70,350/- is still due and payable towards repair cess. I say that it is pertinent to note that major portion of the property tax and repair cess is of the bank premises. Towards the share of property taxes and repair cess, the bank pays separately to the Trust to be paid to the Corporation. Respondent No.2 disputes non-payment of property taxes and other charges for the period of 3 months, i.e. from 1.1.02 to 31.3.02 when the bank premises were unoccupied, which would be around Rs.50,000/- towards repair cess.
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> 4. In the letters annexed to the said affidavit, the Respondent No.2 is trying to dispute the rateable value of the said property since 2005. I say that the property taxes and all other charges are claimed by the Corporation on percentage basis on the rateable value. I say that if the Respondent No.2 disputes the rateable value, the remedy is elsewhere. No such remedy has been adopted by him. I say the fact remains that more than Rs.14 lakhs repair cess is outstanding. Both property tax as well as repairs cess are calculated on percentage basis on rateable value. Taking that fact into account, it is extremely surprising that all property taxes are paid and repairs cess bills are outstanding. Since they are both calculated on the same property on the same rateable value."

Significantly, from the stand taken in paragraph-2 of this affidavit by the Petitioners, it appears that the Petitioners have conceded that the Respondent No.2 has paid all outstanding property taxes. In other words, there are no dues payable to the

Corporation by the Trust in relation to the trust property. I will proceed on the assumption that there is clerical error in the statement made in paragraph-2 and consider the matter on the basis of stand taken by the Petitioners in paragraph-3 and 4 of their affidavit dated 17th July, 2007.

17. The substance of the stand taken on behalf of the Petitioners, on analysing the pleadings and affidavits of the Petitioners, is that, the Respondent No.2 has willfully not paid the entire amount, as demanded by the Corporation, although such amount has already been collected from the tenants and available for payment. It is not the case of the Petitioners that the Respondent No.2 has misappropriated the amount collected by him from the tenants or for that matter misutilised the same. On the other hand, the Respondent No.2 on affidavit has consistently accepted the fact that there are certain outstanding amounts, to be paid to the Corporation, but has explained that there is dispute about the correctness of the demand and that dispute is pending consideration before the Corporation for rectification. As and when that issue is resolved by the Corporation, if necessary, the remainder amount will also be paid. I will proceed on the basis that

the issue raised by the parties is a non-contentious issue. Even so, the question is: whether on account of non-payment of the entire amount demanded by the Corporation towards outgoings in relation to the suit properties, the Trust property or for that matter the interest of any beneficiary has been imperilled. The answer is an emphatic no. There is nothing on record to show that the Corporation has precipitated the matter by issuing show cause notice as to why it should not proceed to attach the trust property for non-payment of the balance outgoings. It is mere apprehension of the petitioners that such course will be taken by the Corporation. It would be a different matter, if such notice was to be issued and inspite of such notice, the respondent No.2 was negligent or avoiding to pay the amount; as a result of which the property was exposed to attachment and/or sale. No such situation has occurred as of now. Moreover, the Respondent No.2 has been stating on affidavit and which stand is substantiated from the contemporaneous documents produced by him alongwith the affidavit, that the matter is pending consideration and rectification before the Corporation. To substantiate this stand representation made to the Corporation have ben relied upon. The documents on record also substantiate that the undisputed amount

has already been paid to the Corporation on behalf of the Trust. In fact, excess payment has already been made by the Trust, which will have to be reimbursed by the Corporation. Whether that stand is appropriate is a matter which will have to be considered by the Corporation on its own merits. The attempt of the counsel for the Petitioners was to persuade this Court to take the view that the Respondent No.2 has failed to take recourse to steps referred to under section 174, 176 and 179 of the Mumbai Municipal Corporation Act. In absence thereof, it is not open to contend that dispute regarding correctness of the demand has been legitimately raised on behalf of the Trust. The argument clearly overlooks that inviting finding on this contention is to answer the issue, which may be relevant for deciding the claim raised by the Respondent No.2 before the Corporation. In fact, if any adverse opinion is to be recorded on that plea, the same will not enure to the benefit of the Trust but inevitably jeopardise the interest of the Trust. In the proceeding of the present kind, therefore, it will not be appropriate to enter upon such controversy.

18. Suffice it to observe that the existing

trustees can be removed by the Court in exercise of powers under Section 74 of the Act only upon recording a finding that the trustee has rendered himself unfit or personally incapable to act in the trust. The expression "unfit" is defined in Black's Law dictionary as follows:

> "**Unfit-** Unsuitable; incompetent; not adapted or qualified for a particular use or service; having no fitness. Word "unfit" means, in general, unsuitable, incompetent or not adapted for a particular use or service. In Interest of Johnson, 214 Kan.780,522 P.2d 330, 334. As applied to relation of rational parents to their child, word "unfit" usually, though not necessarily, imports something of moral delinquency, but, unsuitability for any reason, apart from moral defects, may render a parent unfit for custody. In Interest of Johnson, 214 Kan.780, 522 P.2d 330.334."

From the facts on hand, it is unfathomable to conclude that the Respondent No.2 has conducted himself in such a way that he has rendered himself unfit or incapable to act in the trust. The acts of commission or omission of the Respondent No.2 have in no way resulted in mismanagement of the trust property. Whereas, I find force in the stand of the Respondent No.2 that the present proceeding has been resorted to only to resolve private quarrel between the trustees. It will be apposite to advert to the exposition in **Halsbury Volume 48** in particular

paragraph-774 thereof. The same deals with the power of the Court to remove the existing trustees. It is well established that the Court will remove a trustee where he refuses to execute the trust, or has mismanaged the trust or has disqualified himself by his circumstances or conduct from continuing to hold office and may perhaps do so if his continuance in office would be likely to be detrimental to the trust owing to his being out of sympathy with its objects or with the beneficiaries. Nothing of this kind has happened in the present case. What is relevant for our purpose is to advert to the other statement of law occurring in paragraph-774 of **Halsbury Vol.48**. To wit, it is equally well established position that the trustee will not be removed against his will on account of a pecuniary embarrassment which has ceased to exist and which does not appear to have imperilled the interests of the beneficiaries. Moreover, it will be apposite to advert to the exposition in the case of **Naraindas M. Nagpal's case(Supra),** that the Court will not interfere in exercise of its jurisdiction to resolve private quarrel between the trustees.

19. In the present case, I have no hesitation in taking the view that the conduct of the Respondent

No.2, in fact, is intended to protect the interest of the Trust by raising dispute with the Corporation about the appropriateness of the dues demanded. On the other hand, if the Respondent No.2 was to succumb to the demand of the Corporation, though illegitimate, that could have been a ground to be held against him for not having acted diligently in the interest of the Trust by parting with such substantial amount. As at present, neither the Trust has suffered any pecuniary embarrassment or the property of the Trust is exposed to peril of attachment and/or sale. At the same time, by non-payment of the entire amount to the Corporation on the ground of demand being illegitimate, by no standard, it will either be a case of endangering the interest of the beneficiaries.

20. Taking any view of the matter, there is no substance in the allegations put forth by the petitioners. In other words, in the fact situation of the present case, it is not possible to hold that the Respondent No.2 has rendered himself unfit or personally incapable to act in the Trust. On this finding, the application ought to fail.

21. As is mentioned earlier, the Respondent No.1

has died during the pendency of the present proceeding. Even if the Respondent No.1 was to contest the present Petition, the reason recorded to answer the issue in favour of the Respondent no.2 would apply to the Respondent no.1 on all fours.

22. While parting, it is necessary to place on record that the Registry of our High Court ought not to accept any petition or application filed on the original side, unless the application specifically states the provision, under which the same has been filed. In absence of such disclosure in the petition/application the Court has to dwell upon avoidable controversies, as has happened in this case, when the Respondents assumed that the present petition is ascribable to provision of Sections 34 of the Act and made arguments on that basis. Whereas the Petitioners' Counsel latter on advisedly confined the present Petition to one having been filed under Section 74 of the Act and also limited the scope of enquiry in the context of prayer clauses (a) and (d-a) on the grounds set out in paragraphs 5(D) and 5(G) to 5(K) relating to non-payment of Corporation dues.

23. As the main petition is devoid of merits and

is being dismissed, nothing survives for consideration in the Notice of Motion, which was filed for interim relief during the pendency of the Petition. In fact, no argument was canvassed in the context of reliefs claimed in the Notice of Motion.

24. Accordingly, Trust Petition as well as Notice of Motion are dismissed being devoid of merits.

(A.M.KHANWILKAR,J)